ART. IV. — *Commentaries on American Law.* By JAMES KENT. Seventh edition. New York. 1851. 4 vols. 8vo.

THE law of the land is, in the last resort, the controller of all civil and social action, the protector of all interests, the preserver of all property, the guardian of all rights, the redresser of all wrong; this, at least, it assumes to be, and if it be not all this, nothing else is. We cannot, therefore, think it altogether wise for society to leave to one class all knowledge of a thing so important; to leave it as the exclusive possession of a profession, all of whose members are tempted, and some yield to the temptation, to treat their profession as a trade, and use their knowledge only as the tools of a trade. And yet, in most countries and in most ages, this has been the case. While the law has been, always and everywhere, that which more than any other thing concerned all, the knowledge of it has been left to a very few.

One reason for this is, and has been, undoubtedly, the supposed difficulty of learning the law. And certainly no amount of time or labor is more than enough for the acquisition of that knowledge which is to be used professionally. "No man," said a lawyer who knew as much as most of his brethren, "can learn all the law; the most that he can do is to learn where and how to find the law." But to become acquainted with its general principles and provisions, is not now impossible nor yet very difficult. Once it may have been; once, the professional student knew not how to begin, or in what direction to go; and the oldest veteran hardly knew how to advise or aid the student in his attack upon the rude and undigested mass. But it is not so now. Blackstone began the work of systematizing the study of the law. Others have followed, until the only embarrassment comes from the number and variety of means and facilities. And of those who have thus endeavored to bring the law within the reach, not of the professional student only, but of all, no one has wrought with greater ability and learning, and no one more successfully, than Chancellor Kent.

Between Blackstone's Commentaries, — the great law-book of England, and Kent's Commentaries, — the great law-book of this country, there are, indeed, striking points of resemblance as well as of difference. When, in 1757, Viner

founded the Vinerian Professorship of Law in Oxford, neither the emoluments nor the dignity of the office were sufficient to call from the Bench or the Bar any one who had already climbed the steep ascent and won the highest honors of the profession. William Blackstone, at the age of thirty, had made up his mind that he could not succeed in his profession. Retiring to his fellowship at Oxford, there, in 1753, he read lectures on the laws of England, and continued to read them, with great approbation; and probably from this circumstance, he was appointed Vinerian Professor. On the 25th of October, 1758, he read his first lecture, which now stands prefixed to his Commentaries as an introduction. This was followed by other lectures, which were published — with some alterations no doubt, but with what we know not — in 1765 and the four following years, under the title which they have ever since retained. Even before they were published, these lectures had given him so high a reputation, that he ventured to return to the business of his profession, and met with fair success. In 1770, he was made a judge, and died, holding that office, in 1780.

Probably no work of equal magnitude, and treating of a grave subject, ever met with success so immediate and so entire as this did. It was, indeed, received enthusiastically; it was said, at the time, that no English gentleman considered his library complete without a copy of this work. The author lived less than eleven years after the first publication; but before his death, seven successive editions were called for; since his death, there have been some twenty editions in England, and nearly half as many in this country. There were many reasons for the early success of this work, some good and some bad. In the first place, Blackstone had the ground all to himself. There was no other book which even offered to introduce a student to all the provinces of the English law. Up to that time, students, as we have intimated, groped their way in darkness. "Until of late," said Lord Mansfield, "I could never, with any satisfaction to myself, point out a book proper for the perusal of a student; but since the publication of Mr. Blackstone's Commentaries, I can never be at a loss."

This extreme difficulty of learning the law widened and deepened the separation which had always existed, and, at least until the millennium, will exist, between those who are

and those who are not lawyers. The law was a mystery. The sages who penetrated behind the veil, learned, in the dark recesses to which they found a way, words of power over the fates and fortunes of their ignorant brethren. And when a book appeared which almost promised to make "every man his own lawyer," no wonder that many men were ready to buy and to read. The country gentlemen of England caught at the means of emancipation with somewhat of the same eagerness with which we may suppose the Roman people to have hastened to learn the secret formulas of their law, when, as the story goes, Cneius Cossus, the scribe of Caius Coccus, stole his master's manuscript, and made these formulas public, and thereby destroyed one potent means by which the patricians controlled the people, because, while they alone possessed these formulas, they alone knew how to "carry a case through the courts."

Reaction soon followed; even in his own day, it became a question whether the Commentaries were quite so good a book as some had thought. Men found that reading Blackstone would not make them lawyers. And the old men, upon whose heads the dust of many law books mingled with the snow of many winters, and into whose heads something of that dust had penetrated, if the snow had not, — lifted up a voice of fervid indignation. Should a young man, whose eye was not yet dim, and who had not undergone their long seclusion and their hard labor, undertake to be a learned lawyer; — should he even try to make it easy to learn what it had been the burthen of their life to acquire; — and worst of all, should he be permitted to found a heresy so dangerous, as that it was possible to speak of law as a scholar and a gentleman would wish to speak of all things? No; this book might be written with consummate elegance, and even exhibit — not often, and never obtrusively — but yet exhibit sometimes the charm of eloquence, and sometimes go for illustration to literature, or even to imagination; but if this were so, then, by that very fact, the book proved itself to be no true law book. A good specimen of this manner of thinking may be found in Austin's Outline, page 63.

So the controversy began, and so it raged, and it has continued, in a less degree, even to this day. On the whole, however, lawyers are now pretty well agreed upon the merits

of Blackstone's Commentaries. It is generally if not universally admitted, that as an introductory book it is admirable, but that it certainly cannot, of itself, make one a good lawyer, however diligent his study or clear his comprehension of its contents. For no book has been written, or ever will be written, which could do this. Nevertheless, the unprofessional man, who would learn the general principles of the law, and get a just idea of the origin and constitution of the courts, and the method of their practice, will find now, as he found on the day of its first publication, that this book tells him what no other English book can tell him.

In 1798, James Kent, then a lawyer in high practice, who had filled many public offices, was made Judge of the Supreme Court of New York. In 1804, he was appointed Chief Justice. In 1814, he was appointed Chancellor of New York. This office he held until 1823, when, being sixty years old, the law of New York (since repealed) pronounced him to be superannuated, and his place was vacated. This "fiction of the law" was a most useful one to our whole country. Mr. Kent accepted the office of Professor of Law in Columbia College, in New York, and began there to lecture in February, 1824, and continued to lecture until 1827. His lectures attracted great attention, and in 1826 he began to publish them. The first volume appeared in that year, the second in 1827, the third in 1828, and the fourth in 1830. They were published as "Commentaries on American Law," which title they bear now.*

The success of this work was almost as great as that of Blackstone. It was not so eagerly welcomed, so enthusiastically received by the community at large; but it was far better received by the profession. To them it was indeed a valuable gift; and its value was acknowledged by all. If it is surprising that so severe and long continued a controversy could exist about a law book as that which began with the first appearance of Blackstone, and accompanied it through nearly the whole of its history, it is hardly less surprising

* While these pages are going through the press, we learn with great pleasure, that Judge Kent is now preparing a biography of his father. We know of none at present, except a very brief memoir by his old friend, William Johnson, Reporter of the Supreme Court of New York, which is published in the second volume of the National Portrait Gallery of Distinguished Americans.

that a great book like Kent's could be received at once by such a doubting and denying generation as that of lawyers, and quietly obtain universal favor, with nothing of doubt, nothing of denial, and nothing of reaction. Blackstone had the advantage of making the first book of the kind; but since his day, books intended to explain the law and facilitate its study have multiplied almost indefinitely; Kent's is hardly the hundredth. But, on the other hand, Blackstone was an unknown man, while Kent was known through the length and breadth of the whole country, as one of its best lawyers. Hence, his work was bought at once; few waited to hear what others thought of it; the author's reputation and position were guaranty enough; and Mr. Kent, who died in 1847, lived to publish six editions of his Commentaries.

One defect, common to both of these works, arises from the manner in which they were originally written. They were lectures before classes of young men; and as there is always an objection to mingle distinct topics in one lecture, or to take up in the middle of a lecture or near its close a new topic which cannot be exhausted, or to carry a subject over to another time, if a little compression can avoid this, it is obvious that the fulness of investigation and minuteness of detail must depend somewhat upon the accident of time, which must be their measure. Hence some topics are discussed almost diffusely, while others of equal or great importance are, both by Blackstone and Kent, presented with extreme compactness and severe brevity.

Kent does not cover so much ground as Blackstone; or rather he does not treat of the same topics. His order is not nearly so precise and systematic as that which Blackstone borrowed from Hale's Analysis, and Hale in a good degree from the Civil Law. Nor is the American work so continuous, so much one book, as the English. Many of the chapters, or lectures, of Kent are distinct treatises; each by itself full, clear, and independent. Thus, his chapters on the Domestic Relations constitute the best text-book on that subject in the English language; and are used for that purpose at the Law School in Cambridge. Blackstone says almost nothing of International Law, and but little more than nothing of Equity Jurisprudence, and, we had almost said,

worse than nothing of the Law of Contracts, of Bailments, of Insurance, and of many other important heads of Commercial Law. And it is precisely here that Kent is strongest. But on the other hand, upon Criminal Law, the practice of the courts, and the whole subject of forms of action and the rules of pleading, in regard to most of which Blackstone is very full, and as to all of them excellent, Kent is silent. Nor does either of these writers treat specifically of the important topic, Evidence.

They are both remarkably accurate; in this important respect, we place them both very near the head of the text-books of the law in our language. Few equal them; very few, if any, surpass them. The assailants of Blackstone have sometimes charged him with inaccuracy; but the list of errors even imputed to him is small; that proved, very small. We should, of course, add much to Kent's Commentaries before it would be a complete work, covering the whole ground of American law; and we might wish to vary the language occasionally, where the words used do not express the author's meaning with accuracy and precision; but of positive errors we know of few or none.

We happened to notice one instance in which Kent acknowledges, in a note, that an important statement of his has been much doubted by the Supreme Court of the United States, where, had not his modesty accepted the seeming doubt at once, he might have found that it was only a misquotation which had misled the court, and that his own statement was impregnable. The question is, whether a contract, purporting and intended to be one of marriage, is a valid marriage, when made without any of the forms or ceremonies, civil or religious, prescribed by law or usage. Kent says, (2 vol. p. 87,) "If the contract be made *per verba de præsenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage in the absence of all civil regulations to the contrary, and which the parties (being competent as to age and consent) cannot dissolve; and it is equally binding as if made in *facie ecclesiæ*." A case involving this question was tried in South Carolina, and this passage of Kent was referred to as the law on the subject; but with the omission of the clause "in the absence of all civil regulations to the con-

trary." The court accepted this passage, so cited, as stating the law, and so instructed the jury. The case was taken by appeal to the Supreme Court of the United States; and in the decision given by Chief Justice Taney, the same question is presented, omitting the same words, and the court say, "Upon the point thus decided, this court is equally divided; and no opinion can therefore be given." The difference is obvious. Kent says a contract of marriage, without special forms, is valid, when there are no civil regulations to the contrary; a conclusion which can hardly be denied; at all events, the Supreme Court do not say they doubt this, for what they doubt is, whether such a marriage can be considered valid, without any reference to the civil regulations which may relate to the subject.

And it is a remarkable instance of the "uncertainty of the law," that upon this most interesting and important question, as to the validity of a marriage made by the consent and contract of the parties only, but without any regard to special forms, modes, or ceremonies, not only is the Supreme Court of the United States divided in opinion, but in England also, when the same question came before the House of Lords, which is their supreme judicature, the Lords were equally divided, (10 Clark and Finnelly, p. 534); Lords Brougham, Denman, and Campbell asserting the validity of such marriage at common law, while Lords Lyndhurst, Cottenham, and Abinger denied it.

For the student, both Blackstone and Kent are necessary, and equally necessary. He who at the beginning of his studies can have access to but one of them, must of course content himself with that; but we should never entertain the question which of the two should be chosen, for the ability to choose implies that both are within reach; and when that is the case, both must be read. Blackstone first, not as prior in worth, or in instructiveness, but as earlier in time, and giving much more fully the origin and history and antiquities of the law. And let us say, that a knowledge of the ancient principles of the law is the only sure and safe foundation for a knowledge of existing law; for of this science, more than of any other, may it be truly said, that the past is the parent of the present. Many of the old rules are obsolete; they have lost their positive authority; and he who learns them

may never perhaps find them in his hand as the instrument of practice. But never will he know how to use his instruments, unless he has learned their origin and history, and knows how they grew into their present shape and acquired their present power. All that *is* in the law constantly refers to all that *was*, as its best interpreter. Indeed, a knowledge of the earlier law is the unfailing test, which discriminates between the empiric who has labored to acquire only the knowledge which he expects to sell from day to day, and who, if he knows enough to bring an action, or examine a witness, or argue before a jury, can give no reason for what he knows, — and the sound and genuine lawyer, to whom the empiric must go in all his difficulties, and to whom the client is sure to find his way, when he feels that great interests are involved in the determination of great questions.

When Blackstone has been read, then Kent must follow; and when both have been studied as they should be studied, the student is prepared to go forth in what direction he will, pursuing the different branches of his science by the help of special text-books and the Reports, well prepared to find his labors for the most part easy, and always profitable.

But we must not forget that we are not writing for a law journal; nor should we have touched upon this subject at all, but for the interest which the study of the law should have for all men in the community. Education has a wider meaning now than ever before. It is beginning to be admitted — more as yet in theory than in practice, for so great a truth demands ages for its full development and perfect work, — that all men should know all the things which all men will be the wiser and the better and the happier for knowing. Not that all men must know thoroughly all sciences, for this is of course impossible, and any efforts which aimed at this result would be foolish and ineffectual. But there are two opinions growing up on this subject, side by side, which must have a great influence on the progress of science on the one hand, and on the course of general education on the other. One is, that the various departments of human knowledge have already become so extended, that no scholar can, for any good purpose, attempt to master them all; but that a division of labor being adopted, each must select his specialty, and may then hope to extend the domain of know-

ledge. The other is, that all true science springs from general principles, and these may be few, simple but yet luminous, acquired without great difficulty, and throwing all around them a clear and broad illustration. The reproach of "superficiality" is often made very foolishly. He who knows something of many sciences, but not so much of any one as its professed devotee, may or may not be superficial in his knowledge. It is not a question of quantity, but of quality. If he has burthened his memory with a mass of diversified facts, which he has never made his own by independent thought, and which are therefore barren and unproductive in his own mind, he is superficial, however large the mass may be. He has cut off trees from their roots and stuck them into his garden; and because they have no roots, they will have neither leaf, nor fruit, nor life. However full his mind may be, it is made up of other men's minds, and it is not his own, to use or to enjoy. But if he has wrought the truths he has acquired into principles; if he has, in such measure as he could, harmonized them, and bound them together by the chain of mutual relation, and learned to discern the light they cast upon objects all around him, and to see those objects the more clearly by that light, then is he wiser for all he knows, although he has gathered a little from all the sciences named in an encylopedia.

There is, just now, some outcry about the great number of studies pursued in our colleges, and the variety lately introduced into our public schools. There may be some foundation for this; but the way to remedy the mischief is, to find out how all may be taught without mutual interference, and how much of each may be taught as the living germ of the whole; and it is a fact of happy omen, that some wise men are now earnest in the endeavor to do this. But to say that because the whole cannot be learned, nothing should be taught, is to utter mere nonsense. In the first place, no one can, or ever will, learn the whole of any one science; for it is of God's providence and mercy that the boundaries of knowledge ever recede as they are approached. And, in the next place, much and little in this relation derive their meaning from the age in which they are spoken. A child at a common school may easily learn more, at this day, of many sciences, than Roger Bacon, or Lord Bacon, ever knew;

and they were not superficial men. We cannot learn all of any thing; but the question in each case is, will that which we can learn prove itself worth the learning. Take, for example, the science of Physiology, which has been lately, after some conflict, introduced into some of our public schools. Certainly the child will not — unless he becomes a physician — read a dozen octavo volumes on this subject, and stand with the surgeon at a dissecting table; but it is not sensible to say, that *therefore* he shall know *nothing* of the internal structure of his body, or of the simple laws of life and health; for every one may easily learn enough of this to be of practical utility to himself and others.

So, too, we hold that everybody should know something of the constitution and laws of his country; and we hope the day will come, when, in every school, the grammar of this science will be taught as well as the grammar of his language. Already, at many of our law schools, provision is made for those who enter them, not to become lawyers, but to learn commercial law. And already there are those in these schools, who are there only to complete their education, by adding to it a knowledge of the law as a science. And we think the time is not far distant, when every educated man will feel that it becomes him to know something of the law under which he lives. We can hardly forbear from enlarging upon the peculiar necessity of this, in a country like our own. Here, all men are not lawyers — far are we from wishing that they should be so — but all men select their law-makers, and very many men take their turn in the work of law-making: — a work, after all, of some importance, and which is likely to be better done, when it is not done, as it is at present, by a large body divided into a great majority, ignorant both of the provisions and the principles of existing law, and a small minority who are looked upon with jealousy and suspicion because they are not equally ignorant. That the lawyers of our legislatures sometimes need watching, and pretty close watching too, we do not deny; but we rather think they would be watched to better purpose by knowledge than by ignorance. And here is one reason, even if there were no other, why the study of the law, wisely measured and modified, should become one of the generally required studies of all the citizens of this country.

If the question be put to us by the general student, which of these two books shall I read, for I cannot read more than one, — we have no difficulty in our answer. Take Kent; — you will find in him some chapters which will give you more information on our constitutions, and upon the spirit and working of our institutions, than in any other book which has yet been written. You will find in these Commentaries the law of to-day; and the law of commerce and contract, stated with a fulness due to its proportionate importance. You will not find, and you will not miss, long chapters upon matters exclusively English, and others upon systems or principles which have fallen into disuse, and which, however necessary to him who would be an accomplished lawyer, cannot be of any use to the reader of Blackstone, who does not intend to follow up this reading by a diligent study of the law in its sources. In his preface to his second volume, Chancellor Kent hopes that his work will be found useful "to gentlemen in every pursuit, and especially to those who are to assume places of public trust, and to take a share in the business and in the councils of our country."

It is a little remarkable that Kent, so far as we can judge from his prefaces, thought only of law students, of men of general inquiry, or of the junior members of the profession, as those to whom his book might be useful. And yet it has been found by the working lawyer to be of the greatest and most especial value to him. We doubt whether there is any other book — we are sure there is no other of the size and cost of this — to be found in so many law-offices. And the reason is obvious. It is accurate, it covers nearly the whole ground of common practice, and it carries with it a high authority. In this respect Blackstone does not enter into comparison with it. His Commentaries are not now often quoted as an authority, either in England or this country, not because they cannot be trusted, but because they seldom apply with full adaptation to the existing questions of this day. Kent's are continually cited. In some of our Reports, he is not only referred to, case after case, but the other authorities cited are so exactly what he cites and no other, that it almost seems as if the case were argued on this book alone. But as the book was neither written nor annotated with a special view to this purpose, much remained to be

done to give it its greatest possible utility in this respect; and this is precisely what has been done in this edition of the work.

William Kent, the son of the Chancellor, who has held judicial office in New York, and has filled the chair of the Dane Professorship in the Law School of Harvard University, and who, in both capacities, added honors to an honored name, now edits his father's work. His associate in this labor was Dorman Bridgman Eaton, who, after graduating at the Law School in Cambridge with the highest honors of that large institution, established himself in New York and has devoted himself almost exclusively to this work. Mr. Kent says, in his brief and modest preface, that the present edition has been prepared by him, "with the full and equal coöperation of his friend Dorman Bridgman Eaton, Esq., who has lately become a resident of New York; and whose learning and talents must hereafter, in their independent exercise, become manifest to the profession."

These gentlemen have left the original text and notes of the Chancellor untouched; but have added all that could be gleaned from English or American authorities, to make this book present the last results of the jurisprudence of both countries. The law of this country, as it exists at this moment, may be found here by the student who reads only that he may know, or by the working lawyer who seeks something that he may use. Another important improvement is in the Index; it is far more full and minute. To the student, an Index is of comparatively little value; to the lawyer it is of the first importance, and upon its fulness, its wise arrangement, and its accuracy, depends the available worth of the best law book. The Index now added to Kent's Commentaries increases exceedingly the practical value and utility of this work.

We should be glad to show more specifically what the zeal, learning, and ability of Messrs. Kent and Eaton have done for this edition. But it would be impossible within any moderate limits, and inappropriate to the character of our Journal. We will, however, state that a rough estimate, based upon a comparison of the Table of Cases in the two editions, shows that references to about eleven hundred cases, and about one hundred statutes, have been added to this

edition. The references do not merely give the name, volume, and page of the case, but generally present such a statement of its facts and law, that the reader may judge of its relevance, and know whether it would be useful to him. The compact brevity of these citations, their skilful arrangement, and the use of a smaller type, compress them within so narrow a space, that the bulk of the volumes is not very materially enlarged. The reader, who might like to test the value and interest of these additions, we would refer to the subjects of Admiralty jurisdiction, License cases, and Passenger laws, in the first volume. To volume second, page 446, for the late cases on trademarks — a most interesting and as yet uncertain branch of the law. In the same volume, page 455, we have an interesting case on copyright, decided in England not nine months ago, and now republished in an American work of 2,500 pages. On page 558, much new light is thrown on the difficult subject of *donatio causa mortis.* On page 823, all is done that can be done to determine the right of the factor to sell the goods of his principal — a question upon which the authorities cannot be reconciled. In the third volume, p. 162, a singular state of the law is shown, on the subject of guaranties as affected by the statute of frauds. And on page 164, (all our citations are from the new paging, not the old, which is retained on the margin of the page,) the total want of uniformity or consistency in the law of the several States, as to the rights and liabilities of a third party who writes his name on the back of negotiable paper, is very clearly exhibited. But we must forbear. Let us add only that we congratulate both lawyers who must be, and men of education and liberal inquiry, all of whom ought to be, readers of Kent's Commentaries, that the learning and industry of Mr. Kent and Mr. Eaton have left to them who would find a general but entirely trustworthy statement of existing law, upon any of the topics embraced within these four volumes, nothing to desire.